

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Promotion of Competitive Networks in)	WT Docket No. 99-217
Local Telecommunications Markets)	
)	

Comments of the Public Utility Commission of Texas

On November 30, 2001, the Wireless Telecommunications Bureau (WTB) of the Federal Communications Commission (Commission) issued a *Public Notice (Notice)* seeking comment regarding the current state of the market for local and advanced telecommunications services in multi-tenant environments (MTEs). The *Notice* outlined twelve areas related to competitive local exchange carriers' access to MTEs. The Public Utility Commission of Texas (Texas PUC), having general regulatory authority over public utilities within our jurisdiction in Texas, submits comments on two of the twelve items identified in the *Notice*. These two items are: (10) - state laws or regulations requiring or encouraging nondiscriminatory access and the nature of those laws or regulations; and (11) - the experiences of carriers, building owners, and end users in states that have promulgated nondiscriminatory access requirements, including the numbers and types of complaint and enforcement actions that have been filed.

I. Texas laws and substantive rules¹

In 1995, the Texas Legislature enacted the Public Utility Regulatory Act² § 54.259, Discrimination by Property Owner Prohibited; § 54.260, Property Owner's Conditions; and,

¹ On January 16, 2002, a suit was filed against the Texas PUC by the Texas Building Owners and Managers Association. The suit challenges the constitutionality of this statute and P.U.C. SUBST. R. 26.129. *Texas Building Owners And Managers Association, Inc., Building Owners And Managers Association International, Tanglewood Property Management Company, Emissary Group, And 5599 San Felipe, LTD.*, No. GN-200146 (353rd Dist. Ct., Travis County, Tex., Jan. 16, 2002).

§ 54.261, Shared Tenant Services Contract [as part of a comprehensive package of legislation to open the Texas telecommunications market to competition.] The intent of these specific sections of PURA is to promote competition in the telecommunications market by allowing a tenant under a real estate lease to choose the provider of its telecommunications service.

PURA § 54.259 expressly states that a property owner may not prevent or interfere with a telecommunications utility's installation of telecommunications service upon a tenant's request. In addition, the property owner may not discriminate against the utility company or the requesting tenant. PURA § 54.260 allows the property owner to impose conditions that are reasonably necessary to protect the safety and security of the property and/or persons, and requires the utility to indemnify the owner for any damages caused. Further, for access to the property, the statute requires reasonable compensation payable to the property owner by the requesting carrier. Section 54.261 specifies that a contract is not required between the property owner and the requesting telecommunications utility in order to provide shared tenant services on a property.

To implement these sections of PURA, the Texas PUC initiated a rulemaking proceeding.³ As part of the rulemaking process, Texas PUC staff conducted workshops in three major Texas cities, participated in building tours to develop an understanding of the issues, devised a takings impact assessment pursuant to the Texas Government Code,⁴ accepted written and verbal comments

² See Attachment A: Public Utility Regulatory Act, TEX. UTIL. CODE ANN. §§54.259, 54.260, and 54.261 (Vernon 1998 & Supplement 2002) (PURA).

³ *Rulemaking regarding Building Access pursuant to PURA §§54.259, 54.260, and 54.261*, Project No. 21400 (initiated Sept. 14, 1999) (*Building Access Rule*).

⁴ Administrative Procedure Act, TEX. GOV'T CODE ANN. § 2007.043 (Vernon 2000 & Supp. 2002).

from numerous parties,⁵ and held a public hearing. P.U.C. SUBSTANTIVE RULE 26.129 (SUBST. R. 26.129) became effective on October 10, 2000.⁶

SUBST. R. 26.129,⁷ relating to standards for access to provide telecommunications services at a tenant's request, sets forth procedures whereby, upon a tenant's request, a telecommunications utility may obtain access to a property to install telecommunications equipment in order to provide telecommunications services to the requesting tenant. The rule encourages independent negotiations between the requesting telecommunications utility and the property owner and establishes procedures for resolution by the Texas PUC in the event an agreement cannot be reached. The rule allows for interim relief (subject to true-up) during the pendency of the proceeding so as not to impair or delay the rights of the requesting carrier or tenant. In addition, consistent with PURA §§ 54.259-54.261, the rule outlines parameters for determining reasonable compensation payable to the property owner by the requesting carrier in exchange for access to the property, and prohibits telecommunications utilities from entering into exclusionary agreements with property owners.⁸ Further, the rule addresses situations in which a property owner may deny a carrier's request for access to a building due to safety concerns or space constraints. Through the

⁵ The following parties commented either in writing or orally in Rulemaking Project 21400: Aegis Communications; AT&T Communications of the Southwest; the Building Owners and Managers Association; Broadband Office Communications, Inc.; Camden Property Trust; the CLEC Coalition; Crescent Real Estate Equities Limited; Equity Office Properties; Equity Properties Trust; Gables Residential; Hines Interests Limited Partnerships; the Institute of Real Estate Management; International Council of Shopping Centers; Kucera Management; the National Apartment Association; the National Multi-Housing Council Joint Legislative Program; Smart Buildings Policy Project; Southwestern Bell Telephone Company; Southwest Competitive Telecommunications Association; Texas Apartment Association; Trammell Crow Company; Transwestern Commercial Services; Transwestern Commercial Properties Trust; TrizecHahn Office Properties; United Dominion Realty Trust; Winstar Communications; and Worldcom, Inc. Two individuals also attended the public hearing and offered comments about their experiences as tenants.

⁶ *Building Access Rule*, Order Adopting P.U.C. SUBST. R. 26.129, (signed Sept. 20, 2000). Also, See preamble to adopted *Building Access Rule* at 25 Tex. Reg. 10134 (Oct. 6, 2000).

⁷ See Attachment B.

⁸ See the Reply Comments of the Public Utility Commission of Texas, *In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets*, WT Docket No. 99-217 (filed with the FCC Jan. 12, 2001).

authority granted in PURA and reiterated in § 26.129, the Texas PUC may assess administrative penalties for any violation of the rule or statute whether by a property owner, property manager, or telecommunications utility. Neither SUBST. R. 26.129 nor PURA §§54.259-54.261 distinguishes between commercial and residential MTEs.

II. Complaints

The Commission also requested information regarding the number and types of complaints and enforcement actions that have been filed in states that have promulgated nondiscriminatory access requirements. Since the adoption of the building access rule in October 2000, the Texas PUC has received two formal complaint cases. A brief description of each case and the manner in which it was processed by the Texas PUC is outlined below. Because both cases are presently pending, we refrain from further commentary regarding the cases.

Complaint of Time Warner Telecom of Texas - Docket No. 24604

On September 5, 2001, Time Warner Telecom of Texas, L.P. (TWTC) filed a complaint alleging that the property management company and building owner denied TWTC access to a commercial building for the purpose of providing high-capacity telecommunications services to a requesting tenant.⁹ In the complaint, TWTC requested access to the building and sought administrative penalties.

The Texas PUC referred the complaint case to the State Office of Administrative Hearings¹⁰ (SOAH) on October 5, 2001. Because this was the first case before the Texas PUC regarding a dispute under SUBST. R. 26.129, and because the Texas PUC recognized that a lengthy delay

⁹ *Complaint of Time Warner Telecom of Texas, L.P. Against Tanglewood Property Management and Emissary Group*, Docket No. 24604 (pending). [TWTC filed a subsequent motion for joinder, adding the building owner as a party to the matter].

¹⁰ The Texas PUC refers cases which require resolution of contested issues of fact to SOAH. This allows those cases that clearly require an evidentiary hearing to be processed with minimal delay.

pending the resolution of a dispute of this type would effectively preclude the carrier from providing service to a tenant, the Texas PUC found it appropriate to address interim relief procedures to help guide the process at SOAH.

The Texas PUC devised three scenarios relating to potential building access disputes and included recommendations for resolution regarding interim relief.¹¹ The scenarios related to space, safety, or reasonable compensation disputes, and whether or not an expedited hearing on interim relief might be necessary. Through these examples, the Texas PUC has attempted to balance a carrier's right to access a property with a building owner's right to impose reasonable limitations when bona fide safety concerns or space constraints exist. The interim relief guidelines will be used by administrative law judges as a guide in future complaint cases filed under SUBST. R. 26.129.

Request of NTS Communications - Docket No. 24907

On October 25, 2001, NTS Communications, Inc. (NTS) filed with the Texas PUC a request to resolve disputes under P.U.C. SUBST. R. 26.129 regarding a building owner's alleged refusal to allow NTS access to wiring and facilities on certain multi-dwelling residential properties.¹² NTS indicated that it received numerous requests for telecommunications service from tenants residing in certain multiple dwelling units (MDUs), but had been denied access to wiring and facilities on those properties to serve the requesting tenants due to an alleged exclusive access agreement between the property owner and Tech Telephone Company, L.P. d/b/a/ Tech Tel Communications (Tech Tel). NTS specifically requested that the Commission: (1) issue an order on interim relief allowing NTS access to the necessary wiring and facilities to provide telecommunications services to requesting tenants; (2) set aside the agreement between the property owner and Tech Tel; and, (3) find that

¹¹ See Docket No. 24604, Preliminary Order at 2-4 (selected portions of Order attached).

¹² *Request of NTS Communications, Inc. For Dispute Resolution Under P.U.C. Subst. R. 26.129*, Docket No. 24907 (pending).

NTS has been discriminated against and order that NTS be allowed access to the wiring and facilities on the properties in question on the same terms and conditions as NTS is allowed access to other properties owned by the property owner that are not subject to the agreement with Tech Tel.

On October 30, 2001, the Commission referred the docket to SOAH. As in the TWTC case, the Texas PUC included in the order to SOAH, the interim relief scenarios and recommendations discussed above.¹³ The case remains pending at SOAH.

III. Conclusion

We appreciate the opportunity to offer our comments in this proceeding. Although these comments are limited to select issues referenced in the Commission's *Notice*, the Texas PUC believes that its rulemaking project and complaint cases can provide the commission with valuable insight into the unique challenges and experiences regarding MTEs at the state level. Consistent with its mission and policies, the Texas PUC considers a customer's choice of telecommunications providers in a MTE a vital component of a fully competitive telecommunications marketplace. We invite the commission to build on the experience of the Texas PUC and other state regulatory agencies as it explores the state of competition in the multi-tenant environment market.

¹³ Docket No. 24907, Preliminary Order (Dec. 17, 2001).

Respectfully submitted,

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January 24, 2002

**/s/ Brett A. Perlman
BRETT A. PERLMAN
COMMISSIONER**

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REBECCA KLEIN
COMMISSIONER**

Sec. 54.259. DISCRIMINATION BY PROPERTY OWNER PROHIBITED.

(a) If a telecommunications utility holds a consent, franchise, or permit as determined to be the appropriate grants of authority by the municipality and holds a certificate if required by this title, a public or private property owner may not:

- (1) prevent the utility from installing on the owner's property a telecommunications service facility a tenant requests;
- (2) interfere with the utility's installation on the owner's property of a telecommunications service facility a tenant requests;
- (3) discriminate against such a utility regarding installation, terms, or compensation of a telecommunications service facility to a tenant on the owner's property;
- (4) demand or accept an unreasonable payment of any kind from a tenant or the utility for allowing the utility on or in the owner's property; or
- (5) discriminate in favor of or against a tenant in any manner, including rental charge discrimination, because of the utility from which the tenant receives a telecommunications service.

(b) Subsection (a) does not apply to an institution of higher education. In this subsection, "institution of higher education" means:

- (1) an institution of higher education as defined by Section 61.003, Education Code; or
- (2) a private or independent institution of higher education as defined by Section 61.003, Education Code.

(c) Notwithstanding any other law, the commission has the jurisdiction to enforce this section.

(V.A.C.S. Art. 1446c-0, Secs. 3.2555(c), (e), (g).)

Sec. 54.260. PROPERTY OWNER'S CONDITIONS.

(a) Notwithstanding Section 54.259, if a telecommunications utility holds a municipal consent, franchise, or permit as determined to be the appropriate grant of authority by the municipality and holds a certificate if required by this title, a public or private property owner may:

- (1) impose a condition on the utility that is reasonably necessary to protect:
 - (A) the safety, security, appearance, and condition of the property; and
 - (B) the safety and convenience of other persons;
- (2) impose a reasonable limitation on the time at which the utility may have access to the property to install a telecommunications service facility;
- (3) impose a reasonable limitation on the number of such utilities that have access to the owner's property, if the owner can demonstrate a space constraint that requires the limitation;
- (4) require the utility to agree to indemnify the owner for damage caused installing, operating, or removing a facility;
- (5) require the tenant or the utility to bear the entire cost of installing, operating, or removing a facility; and

(6) require the utility to pay compensation that is reasonable and nondiscriminatory among such telecommunications utilities.

(b) Notwithstanding any other law, the commission has the jurisdiction to enforce this section.

(V.A.C.S. Art. 1446c-0, Secs. 3.2555(d), (e).)

Sec. 54.261. SHARED TENANT SERVICES CONTRACT.

Sections 54.259 and 54.260 do not require a public or private property owner to enter into a contract with a telecommunications utility to provide shared tenant services on a property.

(V.A.C.S. Art. 1446c-0, Sec. 3.2555(I).)

CHAPTER 26. SUBSTANTIVE RULES APPLICABLE TO TELECOMMUNICATIONS SERVICE PROVIDERS.

Subchapter F. REGULATION OF TELECOMMUNICATIONS SERVICES.

§26.129. Standards for Access to Provide Telecommunications Services at Tenant Request.

- (a) **Purpose.** The purpose of this section is to implement Public Utility Regulatory Act (PURA) §§54.259, 54.260, and 54.261 regarding the non-discriminatory treatment of a telecommunications utility by the property owner upon a tenant's request for telecommunications services.
- (b) **Application.**
 - (1) This section applies to the following entities:
 - (A) "Telecommunications utilities" or "telecommunications utility" as defined in PURA §51.002(11), that hold a consent, franchise, or permit as determined to be the appropriate grants of authority by the municipality and hold a certificate if required by PURA;
 - (B) Public or private property owners of commercial property and the property owner's authorized representative(s); and
 - (C) Public or private property owners of commercially operated residential property with four or more dwelling units and the property owner's authorized representative(s).
 - (2) This section does not apply to institutions of higher education as set forth by PURA §54.259(b).
- (c) **Definitions.** The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.
 - (1) **Conduit** – A pipe installed on the property, in a building between floors, attached to walls, between buildings, located in the ceiling or floor space of a building, located on a customer's premise, or from a public right of way into a property for the purposes of containing and protecting cable.
 - (2) **Property** – A building or buildings that are under common ownership and which are located on a single tract of land or tracts of land that are adjoining or would be in the absence of streets or other public rights-of-ways.
 - (3) **Property owner** – The owner of the property or its authorized representative(s).
 - (4) **Requesting carrier** – A telecommunications utility seeking access to space on the property for the purpose of providing telecommunications services to one or more tenants who have requested such services.
 - (5) **Space** – Area of the property for which access is being requested by the requesting carrier, which will be used to install the telecommunications equipment needed to provide telecommunications services to a requesting tenant on the property. Space includes conduit and may be located in or on the rooftop of a building or buildings on the property.
 - (6) **Telecommunications equipment** – The equipment installed or used by the requesting carrier to provide telecommunications services to a requesting tenant.
 - (7) **Tenant** – Any occupant of a building or buildings on the property under the terms of a lease with the property owner which has a remaining term of more than six months and who is not subject to filed bona fide eviction proceedings under such lease with the property owner, or an authorized subtenant of such occupant whose occupancy is subject to the terms of the primary lease which has a remaining term of more than six months.
- (d) **Rights of parties.**
 - (1) **Tenant's right to choose requesting carrier.** A tenant is entitled to choose the provider of its telecommunications services.
 - (2) **Property owner's rights to manage access.** The requirements of this subsection are not intended to eliminate or restrict the property owner's rights to manage access to public or private property pursuant to PURA §§54.259, 54.260, and 54.261.

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§26.129(d)(2) continued

- (A) A property owner may:
 - (i) impose a condition on the requesting carrier that is reasonably necessary to protect:
 - (I) the safety, security, appearance, and condition of the property; and
 - (II) the safety and convenience of other persons;
 - (ii) impose a reasonable limitation on the time at which the requesting carrier may have access to the property to install telecommunications equipment;
 - (iii) impose a reasonable limitation on the number of such requesting carriers that have access to the property, if the property owner can demonstrate a space constraint that requires the limitation;
 - (iv) require a requesting carrier to agree to indemnify the property owner for damage caused installing, operating, or removing telecommunications equipment;
 - (v) require a tenant or requesting carrier to bear the entire cost of installing, operating, or removing telecommunications equipment; and
 - (vi) require requesting carrier to pay compensation that is reasonable and nondiscriminatory among such telecommunications utilities.
- (B) A property owner may not:
 - (i) prevent the requesting carrier from installing telecommunications equipment on the property upon a tenant request;
 - (ii) interfere with the requesting carrier's installation of telecommunications equipment on the property upon a tenant request;
 - (iii) discriminate against such requesting carrier regarding installation, terms, or compensation of telecommunications equipment to a tenant on the property;
 - (iv) demand or accept an unreasonable payment of any kind from a tenant or the requesting carrier for allowing the requesting carrier on or in the property; or
 - (v) discriminate in favor of or against a tenant in any manner, including rental charge discrimination, based on the identity of a telecommunications utility from which a tenant receives telecommunications services.
- (3) **Requesting carrier's right to access.**
 - (A) Upon a tenant request, the requesting carrier has the right to install telecommunications equipment on the property in order to provide telecommunications services to the requesting tenant:
 - (i) for a period no longer than the remaining term of the requesting tenant's lease unless otherwise agreed to by the requesting carrier and the property owner. Should the requesting tenant's lease renew, the agreement between the requesting carrier and the property owner automatically continues, without the need for renegotiation, for the term of the requesting tenant's renewal;
 - (ii) without interference from the property owner, except as provided in this subsection; and
 - (iii) at terms, conditions, and compensation rates which are non-discriminatory.
 - (B) The requesting carrier shall comply with all applicable federal, state, and local codes and standards, *e.g.*, fire codes, electrical codes, safety codes, building codes, elevator codes.
- (4) **Restriction on exclusive agreement.** A telecommunications utility shall not enter into an agreement, contract, pact, understanding or other like arrangement with the property owner to be the sole or exclusive provider of telecommunications services to actual or prospective tenants on the property.

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(e) Procedures upon tenant request.

(1) Tour of property.

- (A) Upon receiving a request for telecommunications services from a tenant, but prior to or concurrently with providing the property owner with notice of intent to install telecommunications equipment as described in paragraph (3) of this subsection, the requesting carrier may request, in writing, a tour of the property to determine an appropriate location for the telecommunications equipment needed to provide the telecommunications services requested by such tenant. This request shall identify the requesting tenant and be sent by certified mail, return receipt requested to the property's on-site manager, or designee, and to the person identified in the tenant's lease to receive notices.
- (B) The property owner shall provide such property tour within ten business days of receipt of the requesting carrier's written request.
- (C) The requesting carrier and the property owner may agree, in writing, to extend the timelines prescribed by this subsection.

(2) Request for technical drawings.

- (A) In its written request for a tour of the property, the requesting carrier may request that the property owner provide computer aided design (CAD) drawings or similarly detailed drawings of the mechanical room(s), risers and other common spaces, if available, in order to assist the requesting carrier in developing plans and specifications for placement of telecommunications equipment.
- (B) Such drawings should be provided to the requesting carrier, within ten business days of the property owner's receipt of the requesting carrier's written request. The requesting carrier will bear the reasonable actual cost of providing the requested drawings.
- (C) The requesting carrier and the property owner may agree, in writing, to extend the timelines prescribed by this subsection.

(3) Notice of intent to install telecommunications equipment.

- (A) Upon receiving a request for telecommunications services from a tenant, the requesting carrier shall notify the property owner not fewer than 30 calendar days before the proposed date on which installation of telecommunications equipment needed to provide the telecommunications services requested by a tenant is to commence.
- (B) Such notice shall be sent by certified mail, return receipt requested, to the property's on-site manager, or designee, and to the person identified in the tenant's lease to receive notices.
- (C) The requesting carrier shall include, but is not limited to, the following in its notice of intent:
 - (i) the identity of the requesting tenant;
 - (ii) the property address and building number (if applicable);
 - (iii) the proposed timeline for the installation of telecommunications equipment;
 - (iv) the type of telecommunications equipment to be installed;
 - (v) the proposed location, space requirements, proposed engineering drawings, and other specifications of the telecommunications equipment;
 - (vi) the conduit requirements, if any; and
 - (vii) a copy of PURA §§54.259, 54.260, and 54.261 and this section (Substantive Rule §26.129).
- (D) The requesting carrier and the property owner may agree, in writing, to extend the timelines prescribed by this subsection.

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(f) Requirement to negotiate for 30 days.

- (1) Upon receipt of the requesting carrier's notice of intent to install telecommunications equipment, the property owner and the requesting carrier shall attempt to reach a mutually acceptable agreement regarding the installation of the requesting carrier's telecommunications equipment and reasonable compensation due the property owner as a result of such installation.
- (2) If such an agreement is not reached within 30 calendar days of the property owner's receipt of the requesting carrier's notice of intent, either party may file for resolution pursuant to subsection (i) of this section.
- (3) The requesting carrier and the property owner may agree, in writing, to extend the period of negotiation prescribed by this subsection.

(g) Parameters for installation of telecommunications equipment. The property owner shall not deny the requesting carrier access to space, except due to inadequate space or safety concerns.

(1) Inadequate space.

- (A) Property owner's denial due to inadequate space. The property owner may deny access to space if it does so within ten business days of its receipt of the requesting carrier's notice of intent to install telecommunications equipment, where the space and/or conduit required for installation is not sufficient to accommodate the requesting carrier's request.
- (B) Demonstration of inadequate space.
 - (i) In the event the property owner denies access to space, the property owner shall demonstrate that there is insufficient space and/or conduit to accommodate the requesting carrier's request for space. The property owner shall allow the requesting carrier to inspect the space and/or conduit to which it is denied access; or it may utilize any other method of proof mutually agreed upon by the property owner and the requesting carrier.
 - (ii) Such demonstration shall be completed within ten business days of the requesting carrier's receipt of the property owner's denial.
 - (iii) Following such demonstration or other agreed upon method of proof, the requesting carrier shall have ten business days to dispute the property owner's assertion that a space limitation exists by pursuing resolution pursuant to subsection (i) of this section.
- (C) The requesting carrier and the property owner may agree, in writing, to extend the timelines prescribed by this subsection.

(2) Safety concerns.

- (A) Property owner's denial due to safety concern. The property owner may deny access to space if it does so within ten business days of its receipt of the requesting carrier's notice of intent to install telecommunications equipment, where the installation of the requesting carrier's telecommunications equipment would cause an unreasonable circumstance that would compromise the safety of the property and/or persons on the property.
- (B) Demonstration of safety concern.
 - (i) In the event the property owner denies access to space, the property owner shall demonstrate that an unreasonable safety hazard that requires the denial of access to space exists. The property owner shall specify the alleged safety hazard and cite any applicable codes and/or standards. The property owner shall allow the requesting carrier to inspect the space and/or conduit to which it is denied access, or it may utilize any other method of proof mutually agreed upon by the property owner and the requesting carrier.
 - (ii) Such demonstration shall be completed within ten business days of the requesting carrier's receipt of the property owner's denial.

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§26.129(g)(2)(B) continued

- (iii) Following such demonstration or other agreed upon method of proof, the requesting carrier shall have ten business days to dispute the property owner's assertion that a safety hazard exists by pursuing resolution pursuant to subsection (i) of this section.
 - (C) The requesting carrier and the property owner may agree, in writing, to extend the timelines prescribed by this subsection.
- (h) **Parameters for determining reasonable compensation for access.**
 - (1) The property owner and the requesting carrier shall attempt to reach a mutually acceptable agreement regarding reasonable and non-discriminatory compensation due the property owner as a result of the requesting carrier's installation of telecommunications equipment required to provide telecommunications services to a requesting tenant.
 - (2) The property owner shall not impose a fee on the requesting carrier unrelated to the requesting carrier's usage of space and/or provision of telecommunications services to a requesting tenant, except as provided by agreement of the property owner and the requesting carrier.
 - (3) The property owner and the requesting carrier shall negotiate terms and conditions concerning the removal of the requesting carrier's telecommunications equipment upon the departure of a tenant served by such requesting carrier or the end of the service agreement between a tenant and the requesting carrier.
 - (4) The property owner may require a security deposit not to exceed an amount equal to one month of fees or rents as determined by the agreement between the requesting carrier and the property owner. The requesting carrier and property owner may agree, in writing, to a security deposit of a differing amount than prescribed by this subsection.
- (i) **Failure to reach negotiated agreement.**
 - (1) **Alternative Dispute Resolution.** As an alternative to petitioning the commission for resolution of a dispute, upon agreement of both parties, parties may voluntarily submit any controversy or claim under this section to settlement by alternative dispute resolution. This alternative dispute resolution shall be conducted under the alternative dispute resolution procedures of the Texas Government Code, Administrative Procedure Act, Chapter 2009, and the Texas Civil Practice and Remedies Code, Chapter 154.
 - (2) **Petition to commission for resolution of dispute.** If a mutually acceptable agreement regarding the installation of the requesting carrier's telecommunications equipment, the reasonable compensation due the property owner as a result of such installation, or other disputed issues is not reached within 30 calendar days of the property owner's receipt of the requesting carrier's notice of intent to install telecommunications equipment, either the property owner or the requesting carrier may petition the commission for resolution. The petition shall include proof of the requesting carrier's proper service of notice of intent to the property owner in the form of an affidavit and attached copy of return receipt.
 - (3) **Types of disputes and information required for each.**
 - (A) Installation dispute.
 - (i) The property owner may deny access consistent with subsection (g) of this section.
 - (ii) The property owner and the requesting carrier shall each provide the commission with information specifying the space or safety related installation dispute(s) that is preventing a negotiated agreement.
 - (iii) The property owner and the requesting carrier shall each provide the commission with information supporting its position in the dispute(s).

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§26.129(i)(3) continued

- (B) Reasonable compensation dispute.
 - (i) The property owner shall provide the commission with the amount of compensation being sought and the basis for such claim, including information supporting the factors listed in clause (iii) of this subparagraph.
 - (ii) The requesting carrier shall provide the commission with information supporting the amount of compensation it deems reasonable to compensate the property owner for installation of its telecommunications equipment.
 - (iii) In determining a reasonable amount of compensation due the property owner for installation of the requesting carrier's telecommunications equipment, the commission may consider, but is not limited to, the following:
 - (I) the location and amount of space occupied by installation of the requesting carrier's telecommunications equipment;
 - (II) evidence that the property owner has a specific alternative use for any space which would be occupied by the requesting carrier's telecommunications equipment and which would result in a specific quantifiable loss to the property owner;
 - (III) the value of the property before and after the installation of the requesting carrier's telecommunications equipment and the methods used to determine such values;
 - (IV) possible interference of the requesting carrier's telecommunications equipment with the use and occupancy of the property which would cause a decrease in the rental or resale value of the property;
 - (V) actual costs incurred by the property owner directly related to installation of the requesting carrier's telecommunications equipment;
 - (VI) the market rate for similar space used for installation of telecommunications equipment in a similar property; and
 - (VII) the market rate for tenant leaseable space in the property or a similar property.
- (C) Other disputed issues.
 - (i) The property owner and the requesting carrier shall each provide the commission with information specifying any other dispute(s) preventing a negotiated agreement.
 - (ii) The property owner and the requesting carrier shall each provide the commission with information supporting its position regarding these other dispute(s).
- (4) **Procedure.**
 - (A) Upon the proper filing of a petition, as set forth in paragraph (1) of this subsection, the commission may proceed to resolution of a dispute pursuant to the commission's procedural rules as set forth in Chapter 22 of this title (relating to Practice and Procedure).
 - (B) In addition to the requirements set forth in paragraph (1) of this subsection, all petitions shall comply with the requirements of Chapter 22, Subchapter D of this title (relating to Notice) and Chapter 22, Subchapter E of this title (relating to Pleadings and Other Documents).
 - (C) The commission may grant interim relief, subject to true-up, so as not to impair or delay, the right of the requesting carrier to install, maintain, and remove its telecommunications equipment, or to provide telecommunications services to a requesting tenant, during the pendency of the proceeding.

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- (j) **Administrative penalties.** The provisions set forth in §22.246 of this title (relating to Administrative Penalties) shall apply to any violation of this section whether by a property owner, property manager, or telecommunications utility.

I. PROCEDURAL MATTERS RELATED TO P.U.C. SUBST. R. 26.129

This is the first case in which the Commission has been petitioned to resolve a dispute under P.U.C. SUBST. R. 26.129, Standards for Access to Provide Telecommunications Services at Tenant Request. This rule implements the Commission authority to enforce PURA §§ 54.295-261.¹⁴ Some issues related to interim relief that are not clearly addressed in this rule have been raised by the parties.¹⁵ As such, the Commission finds that it is appropriate to address issues related to requests for interim relief. This rule expressly allows for interim relief, subject to true up, “so as not to impair or delay the right of the requesting carrier to install, maintain, and remove its telecommunications equipment, or to provide telecommunications services to a requesting tenant”¹⁶ As clearly stated in this rule, the purpose of interim relief is to prevent disputes between requesting carriers and building owners from delaying the provisioning of service to a tenant. The Commission understood that lengthy delays would effectively preclude a carrier from providing service to a tenant.

A carrier’s right to access is not, however, unlimited, and the provision in this rule related to interim relief was not intended to overcome every type of dispute that might arise. A building owner has the right to impose conditions that are reasonably necessary to protect either the safety, security, appearance and condition of the property; or to protect the safety

¹⁴ Public Utility Regulatory Act, TEX. UTIL. CODE. ANN. §§ 11.001-64.158 (Vernon 2000 and Supp. 2001) (PURA).

¹⁵ See Tanglewood’s Appeal of Order No. 2 (Oct. 22, 2001); and TWTC’s Response to Appeal of Order No. 2 (Oct. 24, 2001).

¹⁶ P.U.C. SUBST. R. 26.129(I)(4)(C).

and convenience of other persons.¹⁷ Further, a building owner has the right to impose a reasonable limitation on the number of telecommunications carriers that have access to its building if the owner demonstrates there is a space constraint that requires such limitation.¹⁸ Interim relief in the form of granting access to a carrier where there are bona fide safety concerns or space constraints may not be appropriate. The safety of persons or property cannot be trued up. Even where only issues related to appearance or the condition of the property are disputed, granting relief without fully considering any conditions that might be necessary to protect the property during the pendency of the proceeding is not appropriate. Some impacts resulting from granting access may be easily remedied, while others may be substantial and costly. Such issues require a hearing for resolution.

Consequently, the Commission concludes that it is appropriate to address procedures regarding interim relief in complaints related to space, safety and/or reasonable compensation so as to minimize delays in this docket and future disputes of this nature. A clear procedural framework lends itself to a more timely and efficient resolution of disputes. The Commission sets forth the following interim relief scenarios that could come before SOAH regarding disputes related to space, safety, or reasonable compensation, and provides recommendations for resolutions of these matters.

Scenario 1: *A request for interim relief when the only dispute relates to reasonable compensation.* If there is a request for interim relief when the underlying dispute relates

¹⁷ P.U.C. SUBST. R. 26.129(d)(2)(A).

¹⁸ *Id.*

solely to reasonable compensation for access, the Commission believes that interim relief could be granted without a hearing. Interim relief is subject to true up and there should be no reason to delay access to the building by the requesting carrier under this scenario. Interim relief should be conditioned, however, on the carrier placing in escrow the disputed amount(s) pending resolution of the case. The disputed amounts can include, but are not limited to, a security deposit, setup fee, and a monthly rental fee. After meeting this condition, the carrier should be allowed access to the building and allowed to begin installing telecommunications equipment in order to provide telecommunications services to the requesting tenant during the pendency of the proceeding. Subsequently, the issues in dispute can be fully heard by the ALJ. At the main hearing, a party should not be precluded from bringing up issues relating to safety or space concerns.

Scenario 2: A request for interim relief when there is an installation dispute¹⁹ or other types of disputes other than or in addition to reasonable compensation. If there is a request for interim relief when the underlying disputes include one relating to installation or other types of issues not related to reasonable compensation, the Commission believes that an expedited hearing would be needed before granting interim relief. This initial hearing would focus on issues such as whether there is adequate space to accommodate the request by the telecommunications utility, whether there are safety issues that would prohibit accommodating the request for service, or other disputes not related to compensation. In addition, the ALJ could consider whether conditions could be imposed that would remedy

¹⁹ The installation disputes relate to the availability of space or safety concerns, as discussed in P.U.C. Subst. R. 26.129(g).

the concerns during the pendency of the proceeding. If there are significant issues related to safety or access that can not be ameliorated, interim relief may not be appropriate.

A particular allegation relating to these types of issues should not, however, be considered dispositive on that issue alone. Parties should be allowed to present evidence, and the judge should decide, whether a bona fide dispute exists relating to issues other than compensation. If no bona fide dispute on issues other than compensation exist, the judge should treat the matter under the scenario first described above. No party should be allowed to use dilatory tactics to further delay the granting of interim relief or resolution of bona fide disputes. Once the determination has been made on whether there is a bona fide dispute, the judge then must decide whether there is sufficient evidence to grant interim relief.

If the judge decides to grant interim relief, it should be subject to meeting any conditions found to be appropriate and to placing any disputed amounts into escrow as described above. Subsequently, the requesting carrier should be allowed access to the building and allowed to begin installing telecommunications equipment in order to provide telecommunications services to the requesting tenant during the pendency of the proceeding. If the judge does not grant interim relief, then the carrier must present its case in the main hearing and may not provide telecommunications services to the requesting tenant until the case is resolved. In either case, the judge will determine the merits of the case during the main hearing.

Scenario 3: *Interim relief has not been requested.* If no party requests interim relief, nothing precludes them from bringing up issues relating to safety, space, or reasonable compensation during the main hearing on the merits of the case.